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In the

Supreme Court of the United States
October Term, 1994

HAROLD W. GEORGE, BARRY SKOKOWSKI, SR., and MELVIN R. PRIMAS, individually and in their official capacities,

Petitioners,

v.

JOSEPH CASALE and WILLIAM EDMUNDS,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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48 pp

QUESTIONS PRESENTED

1. Should this court's holdings in Elrod v. Burns, Branti v. Finkel and Rutan v. Republican Party of Illinois, be expanded to public employees to recover damages from their employer without demonstrating either that their employer considered or was even aware of their political affiliations or activities or that those individuals whose appointment assertedly necessitated their termination had engaged in and were being hired because of their political activities and affiliations?

2. Are public officials entitled to qualified immunity under this Court's decision in Harlow v. Fitzgerald where, by virtue of a novel and unprecedented extension of this Court's holdings in Elrod v. Burns, Branti v. Finkel and Rutan v. Republican Party of Illinois, their actions in discharging two public employees are deemed to be violative of the First Amendment even though the public officials did not consider and were not even aware of the political affiliations of the employees?

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v.

JOSEPH CASALE and WILLIAM EDMUNDS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Petitioners Respectfully Request That A Writ Of Certiorari Issue To Review The Judgment Order Of The United States Court of Appeals for the Third Circuit Entered In This Proceeding On March 29, 1995

OPINIONS BELOW

The unreported Judgment Order of the United States Court of Appeals for the Third Circuit, entered on March 29, 1995, is appended hereto as Appendix A. The unreported opinions and orders of the United States District Court entered on November 4, 1993 and June 6, 1994 appear, respectively, as Appendix B and Appendix C.

JURISDICTION

The Judgment Order of the United States Court of Appeals for the Third Circuit was filed on March 29, 1995. The jurisdiction of this Court is therefore invoked under 28 U.S.C.A. §1254(1) to review a judgment of the Court of Appeals by issuance of a writ of certiorari.

CONSTITUTIONAL PROVISIONS AND STATUTES

This matter involves the First Amendment of the United States Constitution which provides that:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

This matter also involves 42 U.S.C.A. 1983.

STATEMENT OF THE CASE

This petition presents the question of whether two former employees of the State of New Jersey may recover damages for the termination of their employment under the principles enunciated by this Court in Elrod, Branti, and Rutan without making any demonstration that the termination of their employment was a result of their political affiliations or activities.

The plaintiffs initiated this action by filing a complaint in the district court for the District of New Jersey against four State officials pursuant to 42 U.S.C.A. §1983, 1985(3) and 1986. The plaintiffs' complaint alleged that the defendant State officials had terminated the plaintiffs' employment with the State of New Jersey because of the

plaintiffs' "political affiliation and associations." The defendants denied that the termination of the plaintiffs' employment had anything to do with their "political affiliation and associations." Moreover, the defendants asserted that they had acted in good faith and were accordingly entitled to qualified immunity.

Following discovery, the plaintiffs elected to dismiss certain of the claims asserted in their complaint. Additionally, the plaintiffs also elected to alter the basic contentions underlying their remaining claims against the defendants. Rather than continuing to assert that their employment had been terminated because of their "political affiliation and associations," they chose instead to contend that the termination of their State employment had been a result of their lack of political affiliation.

A. The testimony at trial

James Florio was inaugurated as Governor of the State of New Jersey in January, 1991. At that time, the State Government was experiencing increasing financial difficulty. As a consequence, the various departments and agencies of the State Government were making efforts to limit expenditures, including those related to employee salaries and wages.

Following his inauguration, Governor Florio appointed Melvin R. Primas as Commissioner of the New Jersey Department of Community Affairs. Primas had previously served as a Mayor of the City of Camden and was a member of the Democratic Party. Primas, in turn, designated Barry Skokowski, an individual who had worked in the Department since 1971, to serve as the Department's Deputy Commissioner. Skokowski was a Republican.

Following their appointments, Primas and Skokowski were responsible for determining how, in light of the State's

financial difficulties, Department expenditures could be curtailed. At the same time, they were also responsible for hiring individuals to work in the Department's various divisions and agencies who would conscientiously carry out the policies established by the Governor and the Department. In determining what steps to take in this regard, Primas and Skokowski examined middle management positions in the Department. A number of the individuals in such positions were in the unclassified civil service status and could accordingly be terminated at will without compliance with the civil service procedures applicable to the termination of employees with classified status. Moreover, termination of such employees would generate greater savings than would the termination of lower level and lower paid employees. Additionally, termination of middle management employees who did not provide services directly to the public would lessen the impact of personnel reductions on the provision of such services.

Among the agencies with which they were concerned was the Office of the Ombudsman for the Institutionalized Elderly. The Office had been established to promote, advocate and ensure the adequacy of the care received by elderly individuals in both public and private institutions. The Ombudsman in charge of the Office is appointed by and serves at the pleasure of the Governor. While he is authorized to appoint employees to work in the Office, he must do so within the limits of funds appropriated or otherwise made available for that purpose. The annual appropriations made by the State Legislature for the Ombudsman are included within that part of the State's annual appropriations acts pertaining to the Department of Community Affairs. The Department is accordingly responsible for handling various fiscal matters for the Ombudsman's Office including processing the hiring and termination of employees and the payment of their salaries and benefits.

Among the functions of the Ombudsman's Office is the investigation of complaints of abuse of elderly people in institutions. The Office employs a number of investigators for this purpose. The plaintiffs had initially hired been as investigators to perform this function. However, they were eventually appointed to supervisory positions within the Office after which neither individual was responsible for personally conducting such investigations. Furthermore, both individuals were unclassified employees and could accordingly be terminated at will.

At the time of Governor Florio's inauguration, William R. Abrams was serving as Ombudsman. Following the inauguration, certain changes occurred within the Ombudsman's office. Both the Office's chief legal counsel and its assistant supervisor in charge of nursing investigators resigned. Moreover, given the continuing need to reduce expenditures both within the Ombudsman's office and within the other divisions and agencies of the Department and the concurrent obligation to appoint individuals to positions within the Department who would carry out the policies of the new administration, Skokowski discussed further staff reductions with Abrams. Given the administration's policy that personnel reductions be focused at the middle management level, Skokowski suggested that Casale and Edmunds be terminated. Abrams rejected Skokowski's and Primas' requests in this regard.

At no time during these meetings did any discussion occur regarding the political affiliations or activities of the plaintiffs. Moreover, the record indicates that neither Skokowski nor Primas knew, or had any reason or basis for knowing what political affiliations, if any, the plaintiffs may have had or what political activities, if any, they may have engaged in.

As a result of his refusal to discharge the plaintiffs and to otherwise cooperate with the administration's efforts to

reduce the level of expenditures, a decision was made to replace Abrams as Ombudsman. However, it was also agreed that he would continue to oversee the activities of the Office until such time as his successor was appointed. Nevertheless, in light of Abrams' holdover status and his unwillingness to cooperate in reducing expenditures at the Ombudsman's Office, Skokowski concluded that it would be necessary to assign another individual to monitor the Office's operations until a new appointment was made.

Skokowski selected Elaine Mahoney to perform this function. Mahoney had previously worked in various positions both in other public agencies and in private business and most recently had been employed with the New Jersey Builders Association where she worked in public relations and performed some lobbying. No evidence was presented, however, that Mahoney had ever been affiliated with or had engaged in political campaigning or activities on behalf of a particular political party or candidate.

Two other individuals, Tom Brown and William Macchi, were also hired to work at the Ombudsman's Office during this period of time. Both had had extensive experience in working with elderly institutionalized individuals. Brown had worked with such individuals in various capacities for a number of years in Maryland. Macchi had served as director of a county office on aging in New Jersey. While the evidence presented at trial indicated that Brown had known Primas, on a personal basis, for a long period of time, no evidence was presented to indicate that Brown had ever worked, had ever been active, or had ever been affiliated in any manner with any political organization or that he had been hired on the basis of any affiliations with or any activities undertaken on behalf of any political party or candidate. Similarly, while Macchi had served in an appointed public office for some period of time prior to his employment with the Ombudsman's Office, there was also no evidence presented

regarding any political activities or affiliations on his part prior to his employment with that Office.

In September, 1990, Harold George was appointed to replace Abrams. George had previously served as a Deputy Attorney General of the State of New Jersey. No evidence was presented that George had ever been affiliated with any political party or had ever been engaged in political activity in any way.

Following his appointment, George made an evaluation of the Office to determine what changes he might wish to make. In doing so, George was mindful of the budget constraints within which he was required to operate. On the basis of this review, George decided that a legal counsel needed to be hired and also that a significantly greater emphasis should be placed upon disseminating information regarding the Office and its activities to those facilities and individuals for whom the Office was responsible. On the basis of these considerations and circumstances, George concluded that it would be necessary to terminate the plaintiffs' employment in order to make funds available to hire a legal counsel and a public relations officer. As a consequence, George forwarded letters to the plaintiffs to advise them that their employment with the Ombudsman's Office would be terminated.

In making this decision, George was unaware of whether Casale or Edmunds were or were not members of any political party or of whether either of these individuals had ever engaged in political activities. Nor is there any evidence that George was aware of whether any other employees in the Office had any political affiliations or had engaged in any political activities.

Following the termination of the plaintiffs, various measures were implemented to reorganize the Office. At the time that Brown was hired, Casale had been on extended

sick leave. In his absence, Brown assumed his responsibilities of supervising the investigators in the Office. Given this circumstance, George concluded that Brown would assume the responsibilty of supervising all of the Office's investigators. During Abrams' tenure as Ombudsman, he had employed three separate individuals, a supervisor and two assistant supervisors, for this purpose. Moreover, Brown also assumed the responsibility for maintaining a caseload which required that he conduct investigations of complaints himself. During their employment, neither Casale nor Edmunds had maintained such a caseload.

George also hired Goldie Colonna, Esq., to serve as legal counsel and appointed Elyse Rosser to head the public affairs unit he had established through to better disseminate information regarding the activities of the Office to individuals and facilities for which the Office was responsible. No evidence was presented regarding what, if any, political affiliations Colonna or Rosser may have possessed or what, if any, political activities they may have previously engaged in.

The record in this matter is barren of any evidence which would indicate that either of the plaintiffs were terminated from their employment because of their political affiliations and associations. In fact, there0 was no evidence as to what, if any, political affiliations they may have had. Nor was there any evidence presented regarding the political affiliations and activities of those individuals, i.e. Brown, Macchi, Mahoney, Colonna and Rosser, who were hired to work at the Ombudman's Office during this same time period. Rather, the evidence presented at trial indicated that none of the defendants knew or were in any way aware of whetherthe plaintiffs were or had ever been affiliated with or active in any political organizations.

B. The rulings below

At the conclusion of the plaintiffs' case, defendants moved for entry of judgment as a matter of law pursuant to Fed.R.Civ.P. 50(a). The district court elected to reserve decision with regard to this motion. The defendants then rested and once again moved for entry of a judgment as a matter of law pursuant to Fed.R.Civ.P. 50(a). Again, the district court reserved decision and proceeded to submit the case to the jury. In doing so, the district court rejected the objection of the defendants to the inclusion of an instruction in the jury charge that the jury could find for the plaintiffs if it found that they had been terminated to permit the hiring of "politically connected" individuals.

Following deliberation, the jury returned verdicts awarding the plaintiffs both compensatory and punitive damages. Thereafter, on November 4, 1993, the district court issued an Opinion and Order denying defendants' motion for judgment as a matter of law pursuant to Fed.R. Civ.P. 50(a). In issuing its opinion, the district court held that the plaintiffs' claims "that they were dismissed because they were insufficiently active in politics, and in order to make room for politically-connected individuals" fell within the protection of the First Amendment.

A Judgment was subsequently entered on December 15, 1993 reflecting the verdict rendered by the jury. At that time, defendants renewed their request for the entry of a judgment as a matter of law pursuant to Fed.R.Civ.P. 50(b) and also made application for a new trial pursuant to Fed.R.Civ.P. 59.

On June 6, 1994, the trial court issued on Opinion and Order denying the defendants' motions in this regard. Thereafter, on July 1, 1994, the defendants filed a Notice of Appeal with the Court of Appeals for the Third Circuit pursuant to 28 U.S.C.A. §1291 seeking review of the trial

court's orders of November 4, 1993 and June 6, 1994 as well as the Judgment entered in this matter on December 15, 1993. On March 29, 1995, the Third Circuit Court of Appeals issued a Judgment Order affirming the Judgment of the District Court for the reasons set forth in the district court opinion dated November 4, 1993

ARGUMENT

THIS COURT SHOULD GRANT CERTIORARI TO REVIEW THE JUDGMENT ORDER OF THE CIRCUIT COURT BECAUSE THE DECISIONS OF THE CIRCUIT COURT AND THE DISTRICT COURT BELOW CONSTITUTE A TOTALLY UNPRECEDENTED AND UNWARRANTED EXTENSION OF THE PROTECTIONS WHICH THIS COURT'S DECISIONS IN ELROD V. BURNS, BRANTI V. FINKEL AND RUTAN V. REPUBLICAN PARTY OF ILLINOIS AFFORD TO PUBLIC EMPLOYEES FROM DISCHARGE OR OTHER ADVERSE EMPLOYMENT ACTION ON THE BASIS OF THEIR POLITICAL AFFILIATIONS AND ACTIVITIES

Under the First Amendment of the United States Constitution, public employees are, with certain exceptions, protected from discharge or other adverse employment action as a result of their political affiliations or activities. However, as is made clear in this Court's decisions in Elrod v. Burns, 427 U.S. 347 (1976), Branti v. Finkel 445 U.S. 347 (1980) and Rutan v. Republican Party of Illinois, 497 U.S. 62 (1990), the protections afforded by the First Amendment in this regard are intended to protect such employees from employment actions taken by their employers on the basis of partisan political considerations and which would, as a consequence, serve to coerce such employees to adopt, or to disassociate themselves from, a particular political belief.

The decisions of the Court of Appeals and the district court below represent a radical departure from the principles enunciated in Elrod, Branti and Rutan and constitute an unprecedented and unwarranted expansion of this Court's prior holdings in those cases. They purport to extend the protection of the First Amendment to employment actions affecting public employees without regard to whether such actions are based on or have any relationship to the employees' particular political activities or beliefs.

In plain language, the plaintiffs' First Amendment claims in this matter have absolutely nothing to do with their political beliefs. Rather, the plaintiffs claim that the First Amendment is intended to protect public employees from being fired or demoted solely because they do not have the right "connections" or "know the right people". This Court has never held that the principles enunciated in Elrod, Branti and Rutan were intended to extend to such circumstances or be given such scope.. Further, the implications which such an extension of these principles would pose for public employers are enormous. Accordingly, this Court's intervention in this matter, through the issuance of a writ of certiorari to the Court of Appeals, is required.

This Court's decisions in Elrod, Branti and Rutan have established the principle that a public employee's continued employment may not be conditioned upon the pledging of that employee's alliance to a particular political party, on working for a particular political party or on making financial contributions to a political party. These decisions have accordingly made clear that public employees may not be discharged as a result of the practice of "patronage", e.g. the practice under which public employees hold their jobs on the condition that they provide, in some acceptable manner, support for the favored political party.

In seeking to avail themselves of the protections afforded under Elrod, Branti, and Rutan, public employees must, of course, demonstrate that any discharge or other adverse employment action to which they have been subjected has from their choice to engage or not engage in activities protected by the First Amendment, i.e. to affiliate or not affiliate with or to renderor to not render support to a particular political party or candidate. In turn, in order to meet this standard, public employees must show that their continued employment was conditioned on a pledge of political alliance to a particular political party or candidate, on the provision of financial support to such a party or candidate, on the provision of work for a political party or candidate, or on the need to obtain sponsorship from a particular party or candidate. Elrod v. Burns, 427 U.S. at 355.

The factual predicates of this Court's decisions in Elrod, Branti and Rutan reflect the public employee's obligation in this regard. In Elrod, the plaintiffs established a longstanding practice on the part of their public employer of replacing non-civil service employees with members of his own party and demonstrated that, in order to maintain their jobs, "they were required to pledge their political allegiance" to a specific political party. Elrod v. Burns, 427 U.S. at 350-351. Similarly, in Branti, the plaintiffs, assistant prosecutors whose employment was terminated following the election of a new prosecutor, established that all but one of the assistant prosecutors retained by the prosecutor were members of the prosecutor's political party and had all been selected and sponsored by legislators or political chairmen of that party on a basis that had been determined at a political party caucus. Branti v. Finkel, 445 U.S. at 509-510. Likewise, in Rutan, the plaintiffs established that all employment decisions made following the election of the Governor named as a defendant in that case were required to be reviewed by the Governor's office which, by determining whether existing and prospective employees had

provided financial support to or voted in the primaries of the Governor's political party, used that system to operate a political patronage system "to limit State employment and beneficial employment-related decisions to those who are supported" by the Governor's party. Rutan v. Republican Party of Illinois, 497 U.S. at 66.

Accordingly, it is the obligation of plaintiffs who assert claims under Elrod, Branti, and Rutan to demonstrate that their employment has been terminated because of their political affiliation or lack thereof. Laskaris v. Thornburg, 733 F. 2d 260 (3d Cir.1984) cert. denied 469 U.S. 886 (1984). Moreover, implicit in their obligation to make such a demonstration is the essential obligation to demonstrate that their public employers knew either of their participation in activities protected by the First Amendment or of their choice not to engage in such activities. Laskaris v. Thornburgh, 733 F. 2d at 265.

The decisions of the Court of Appeals and the district court below represent a radical departure from the principles which this Court has enunciated in Elrod, Branti and Rutan. The plaintiffs in this matter were permitted to recover substantial damages against the State official defendants without having been required to establish any legally sufficient evidentiary basis in support of their claims that they were terminated on the basis of their political affiliations. In fact, the evidence presented at the trial supports only one reasonable conclusion: the termination of the plaintiffs Joseph Casale and William Edmunds from their employment with the State of New Jersey had absolutely nothing to do with whatever decisions they may have made to engage or not engage in activities protected by the First Amendment of the United States Constitution. Yet, notwithstanding the plaintiffs' failure to produce evidence to support of their claims that they lost their jobs because of their political affiliation, the district court permitted the jury to conclude, on the basis that certain individuals were

"politically connected", the defendants were liable for damages for having violated the plaintiffs' First Amendment rights.

Moreover, in denying the defendants' motion for judgment as a matter of law, the district court did not even address the burden of proof imposed on public employees in cases such as this. Rather, the district court merely noted that public employees have a cognizable claim under the First Amendment where they are discharged "to make room for politically connected individuals" and then proceeded to hold that evidence of the requisite knowledge and intent of the defendants need not be established by direct evidence. The district court then concluded that the defendants' motion should be denied without noting one specific piece of evidence presented by the plaintiffs to meet their burden under the foregoing cases.

While the First Amendment protections articulated in Elrod, Branti and Rutan may extend to public employees who choose not to engage in political activity, see Bennis v. Gable, 823 F. 2d 723, 731 (3d Cir. 1987), the standards for determining whether the First Amendment rights of such employees have been violated must be the same as for public employees who choose to actively engage in such activity. More particularly, in seeking to invoke the principles articulated in Elrod, Branti and Rutan, a plaintiff bears the burden of proving: (1) that he is a public employee; (2) that he chose to engage or not engage in a protected activity, such as maintaining or not maintaining an affiliation with a particular political party; and (3) that his choice to associate or not to associate was a substantial or motivating factor in the state actors' personnel decision. Moreover, implicit in this obligation is that the plaintiff demonstrate that defendants at least knew of the plaintiffs' decision to participate or not to participate in such political activity. Otherwise, the public employee's political

affiliations would have had nothing to do with his termination.

A review of the record below indicates that plaintiffs absolutely failed to make any such demonstration here. First, the evidence presented indicated that none of the defendants were aware either of the political affiliations or activities of the plaintiffs or of any determinations made by the plaintiffs not to engage in such activities. Moreover, the plaintiffs acknowledged in their own testimony that none of the defendants knew, or would have had reason to know, of their political affiliations or activities, or of their decision not to affiliate with or support any political organization or candidate, prior to the decision to terminate their employment.

In lieu of making such a demonstration, plaintiffs asserted instead that they were terminated in order to permit the hiring of other individuals with the "proper" political affiliations. However, plaintiffs failed to present any evidence whatsoever as to what, if any, political affiliations these individuals may have had or as to what, if any, political activities these individuals may have undertaken in providing support to any political candidate or organization.

In sum, there was simply no evidence to support a conclusion that the decision to terminate the plaintiffs' employment had anything to do either with their decision not to affiliate with or support any political party or organization or with the political affiliations or activities of the individuals whose employment allegedly caused the plaintiffs' termination. The decisions in Elrod, Branti and Rutan do not stand for the proposition, as asserted by plaintiffs, that public employees cannot be discharged merely because they do not "know" the right people. Rather, in order to fall within the protection afforded by these decisions, a public employee must demonstrate that he or she was terminated because of a conscious determination

made by his or her employer that relates to that employee's engaging or failing to engage in political activities protected by the First Amendment.

Moreover, not only are the the rulings of the Court of Appeals and the district court a significant departure from this Court's decisions in Elrod, Branti and Rutan, they are also in conflict with the reported decisions of other Courts of Appeals and, in fact, with the prior decisions of the Third Circuit in this area. In its prior decision in Laskaris v. Thornburgh, supra, 733 F. 2d at 265, the Third Circuit had made clear that public employees alleging unlawful discharge on the basis of political affiliation (or lack thereof) have the obligation of demonstrating that the discharges were the result of a conscious decision by their public employers to terminate their employment either because of the employee's political affiliations or because of a desire to provide employment to other individuals who have been shown to have been political supporters of the political party in power.

In Laskaris, the plaintiffs presented evidence that they were members of the Democratic party at the time they were discharged and that at least one of the individuals hired to replace them was a Republican. Id. at 265. They also presented evidence that one of the defendants had indicated that he expected the newly elected Governor to "clean house" and had further recommended the termination of "incompetent political hacks." Id. at 265. In reviewing the record before it, the Third Circuit found that the plaintiffs had failed to produce any evidence indicating that the defendants had any knowledge of the plaintiffs' political affiliations. Id. at 265. While observing that the evidence presented by the plaintiffs might be viewed as having a "vague aura of politically motivated patronage firings," the Third Circuit found that such evidence was "far too insubstantial" to show that plaintiffs were discharged because of their political affiliations. Id. at 266. Rather, the

Third Circuit held that the plaintiffs must "produce evidence sufficient to show that the defendants knew of their political persuasions" and accordingly ruled that, without demonstrating that the defendants possessed such knowledge, the plaintiffs could not show that their discharge was politically motivated. Id. at 265.[1]

The Second Court of Appeals has also articulated a similar standard. In fact, the Second Circuit Court of Appeals cited the standards set forth in Laskaris in rendering its opinion in Savage v. Gorski, 850 F.2d 64 (2d Cir. 1988),wherein the Court held that the plaintiffs' failure to produce evidence that the defendants in that case were aware of the plaintiffs' political affiliations would bar the plaintiffs' claim of termination on the basis of political affiliation. The evidence in that case indicated that the defendant, a newly elected County Executive, had directed that a list be prepared of all positions in the county without civil service protection although the list did not indicate the name, political affiliation or political activity of any individual employee. Id. at 65. The plaintiffs further presented evidence indicating that they were active in politics and that the defendant County Executive knew of the political activities of at least one of the plaintiffs. Id. at 66. However, nothing in the record indicated that the defendant County Executive had sought to determine the political affiliations of any employee on the list. Id. at 65.

In reviewing the district court's entry of a preliminary injunction against the discharge of the plaintiffs, the Second Circuit noted that the plaintiffs had failed to offer any evidence that the defendant was aware of the political

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[1] See also Bennis v. Gamble, 823 F. 2d 723 (3d Cir. 1987) (holding that the First Amendment protections enunciated in Elrod would protect public employees from being demoted where the employees could prove that their demotion was a result of their failure to provide political support to a newly elected mayor or that they had been demoted to permit the appointment of the mayor's partisan political supporters.)

activities or affiliations of two of the plaintiffs. Id. at 68. Citing Laskaris, the Second Circuit concluded that the plaintiffs' failure to produce such proofs would bar their claim for recovery under the First Amendment. Id. at 68. The court further noted that evidence of the plaintiffs' competence in the performance of their job duties and of the fact that the defendant was a Democrat who had succeeded a Republican administration would be insufficient to support a finding that the plaintiffs' discharges were politically motivated. Id. at 68. Accordingly, in considering the nature of the proofs which a plaintiff must offer in order to prevail on a claim of improper termination because of political affiliation, the Second Circuit followed the Third Circuit's prior holding in Laskaris that such a plaintiff must demonstrate that the defendants had knowledge of the plaintiff's political affiliations.

Similarly, in Correa v. Fischer, 982 F.2d 931 (5th Cir. 1993), the Fifth Circuit also considered the nature of the proofs which a plaintiff must adduce in supporting a claim of improper discharge on the basis of political affiliation. In that case, four employees of a county attorney's office were terminated by the newly elected County Attorney. Id. at 931-932. The discharged employees filed a §1983 action alleging that their dismissals violated their First Amendment rights. Id. at 932. The Fifth Circuit held that, in order to prevail upon such a claim, the plaintiffs had an obligation to demonstrate that their termination "must be motivated by political concerns." Id. at 933. The newly elected County Attorney had advised the plaintiffs that they were being discharged because of lack of funding, because of an incompatibility between the County Attorney and the employees, and because the County Attorney wanted a staff that would be "loyal" to him. Id. at 933-934. The Fifth Circuit concluded that such a letter did not support the plaintiff's claims that they were terminated because of their political activities or affiliations. Id. at 934. In reaching this conclusion, the Fifth Circuit noted that the plaintiffs had

provided no evidence that the individuals hired to replace the plaintiffs were people who had helped the County Attorney in his campaign or were otherwise "politically favored" by the County Attorney. Id. at 934. Further, the Fifth Circuit noted that there were no evidence or allegations that the County Attorney even knew of the plaintiffs' political affiliations or beliefs. Id. at 935.

Likewise, the Seventh Circuit has, on two separate occasions, rejected claims by plaintiffs that they were terminated in violation of their First Amendment rights because such plaintiffs had failed to adduce sufficient evidence to demonstrate that their terminations were politically motivated. In Endicott v. Huddleston, 644 F.2d 1208 (7th Cir. 1980), the plaintiff presented evidence that he was a Democrat, that the defendants were Republicans, that there had been numerous conflicts between himself and the defendants, and that, for at least two years prior to his termination, two of the defendants had made clear that they wished to have him removed from office. Id. at 1215. The Seventh Circuit held that, even were it to draw all reasonable inferences from the evidence viewed in a light most favorable to the plaintiff, there was insufficient evidence from which a jury could find that the defendants' actions were motivated by political considerations. Id. at 1215. Similarly, in McMillian v. Svetanoff, 878 F.2d 186 (7th Cir. 1987), the Seventh Circuit, in considering a claim by a discharged employee that her termination was a result of her political affiliations, concluded that, even were the plaintiff to have successfully demonstrated that the judge who had terminated her employment was affiliated with the opposite political party, that fact would be insufficient to show that her political affiliation was a motivating factor in her dismissal. Id. at 191.

Additionally, the Ninth Circuit has also addressed the nature of the evidence which a plaintiff must present in seeking to recover on a claim of improper termination on

First Amendment grounds. In Erickson v. Pierce County, 960 F.2d 801 (9th Cir. 1992), cert. denied 113 S.Ct. 815 (1992), the plaintiff claimed that she was discharged because of her political support of her former supervisor who was defeated during an election by one of the defendants. Id. at 802. Following his election, this defendant forwarded a letter to the plaintiff setting forth a number of reasons related to her job performance in support of his decision to terminate her employment. Id. at 803-804. The plaintiff claimed, however, that she was discharged solely because of her support for the defendant's political opponent. Id. at 804.

While the Ninth Circuit concluded that plaintiff had established that she had engaged in constitutionally protected activity, i.e. the provision of political support for her former employer, the court also found that the plaintiff had not established that this was a motivating factor in her termination. Id. at 804. Upon reviewing the evidence presented by the plaintiff, the Ninth Circuit concluded that, although the plaintiff had presented evidence to demonstrate that she had been a supporter of a political candidate and that she had subsequently been terminated by that candidate's opponent, she had not demonstrated that she had been terminated because she was a supporter of that candidate. Id. at 805. In other words, the court held that a plaintiff in a First Amendment case has the burden of showing not merely that he or she has engaged in constitutionally protected activity and that he or she was subsequently terminated but also that the defendant or defendants knew of the plaintiff's political activities and that their decision to terminate the plaintiff was based on such activities. In turn, where a plaintiff fails to produce proof that the defendants knew of the plaintiff's political activities or affiliation and decides to terminate the plaintiff on the basis of such activities or affiliation, the plaintiff has not satisfied his or her burden of proof and the defendants are accordingly entitled to judgment as a matter of law.

The decisions of the Second Circuit in Savage, the Ninth Circuit in Erickson, and the Fifth Circuit in Correa, as well as the two aforementioned decisions of the Seventh Circuit in Endicott and McMillian, all clearly indicate that, in order for a plaintiff to prevail on a claim of improper discharge under the First Amendment, it is not enough for that plaintiff to show that he or she was politically affiliated or politically active (or politically unaffiliated and politically inactive) and that he or she was subsequently terminated by his or her public employer. Rather, to prevail upon such a claim, such a plaintiff also must demonstrate that the defendants were aware of the plaintiff's political activities or affiliation, or lack thereof, and further that the defendants' knowledge of such circumstances was a substantial or motivating factor in the defendants' decision to terminate the plaintiff. In other words, a public employee must clearly demonstrate a nexus between the employee's political affiliations or activities and the employer's decision to terminate the employee. In the absence of such a showing, a public employee cannot prevail on such a claim.

In permitting the plaintiffs in this matter to recover damages against the defendants without making such a showing, the decisions of the Court of Appeals and the district court in this matter are clearly in conflict with the decisions in these other Circuits as well as with the Third Circuit's own prior decision in Laskaris. The basis of the plaintiffs' claim in this matter was that they were discharged in order to permit the hiring of certain "politically connected" (as opposed to politically affiliated) individuals. Their evidence of such "political connections" was that two of these individuals had previously been employed in governmental positions and that a third had known one of the defendants for a period of fifteen years. The mere circumstance that two of the individuals in question had previously worked for public employers (as hundreds of thousands of other individuals have) and that a third

individual had known one of the defendants for a long period of time, when considered in light of the decisions noted above, clearly cannot support a claim that these other individuals were hired because of their political affiliations or political activities and, in turn, that the plaintiffs were terminated because of their failure to maintain certain political affiliations or engage in political activities.

In light of the foregoing, it is clear that the holdings of the Third Circuit Court of Appeals and the Federal District Court below constitute a significant departure from this Court's decisions in Elrod, Branti and Rutan, that they are in conflict with the decisions of other Circuit Courts of Appeal and that they are inconsistent with the prior decisions of the Third Circuit itself. Moreover, it is also clear that the termination of the plaintiffs in this matter did not in any way implicate a violation of their First Amendment rights. Accordingly, this Court should grant the petition for certiorari.

SINCE THE HOLDINGS OF THE DISTRICT COURT AND THE COURT OF APPEALS REGARDING THE PROTECTIONS AFFORDED TO PUBLIC EMPLOYEES UNDER ELROD, BRANTI, AND RUTAN CONSTITUTED A TOTALLY UNPRECEDENTED AND UNWARRANTED EXTENSION OF THE PRINCIPLES ENUNCIATED IN THOSE CASES AND ACCORDINGLY COULD NOT HAVE REASONABLY BEEN ANTICIPATED BY THE DEFENDANTS, THE DEFENDANTS ARE ENTITLED TO THE PROTECTIONS AFFORDED TO PUBLIC OFFICIALS UNDER THE DOCTRINE OF QUALIFIED IMMUNITY

In Harlow v. Fitzgerald, 457 U.S. 800 (1982), this Court established the standard for determining whether public officials may avail themselves of the doctrine of qualified immunity. The Court held that:

> government officials performing discretionary functions generally are shielded from liability from civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. [Id. at 818; Emphasis supplied].

In other words, in order for conduct to be deemed violative of clearly established law, the unlawfulness of the conduct must be apparent in light of pre-existing law. Anderson v. Creighton, 483 U.S. 635, 640 (1986).

As has been made clear in Point I, the rulings of the Court of Appeals and the district court below represent an unwarranted and unprecedented extension of the protections provided to public employees under Elrod, Branti and Rutan and reflect a view of the scope of these protections which goes far beyond what this Court had ever contemplated. Unlike the prior decisions which have been rendered by this Court and by the Circuit Courts of Appeals, the decisions below would not require public employees to demonstrate that they had been discharged or demoted because of their political beliefs. Rather, under the lower courts' rulings, such employees could invoke the First Amendment against employment actions on the basis that they did not have the right "connections" or "know the right people."

As no court has ever articulated such an exceedingly broad (and unwarranted) view of the First Amendment, the decisions of the lower courts did not in any way involve the application of "clearly established constitutional rights" and could not have been reasonably anticipated by the defendants. In turn, defendants were clearly entitled to the

protection which the doctrine of qualified immunity is intended to provide to public officials under such circumstances and the failure of the lower courts to apply the doctrine in this case warrants review by this Court.

In the present matter, plaintiffs initially asserted that they had been discharged because of their political affiliations. However, there was no evidence in the record whatsoever to support a conclusion that defendants acted to terminate plaintiffs' employment on the basis of the plaintiffs' political affiliations. To the contrary, the record clearly indicated that none of the defendants even knew what the political affiliations, if any, the plaintiffs had. As a consequence, the plaintiffs changed their contentions to assert instead that they had been terminated to permit the hiring of other individuals, who supposedly were "politically connected" and consequently "knew" someone.

As has been discussed in Point I above, a public employee is required, in seeking recovery under Elrod, Branti and Rutan, to establish both that the public employer acted upon the basis of his or her knowledge of the public employee's political affiliations or lack thereof and that knowledge of such political affiliations (or lack thereof) was a substantial and motivating factor in the employee's termination. This Court's holdings in Elrod, Branti, and Rutan are intended to protect public employees from being discharged as a result of the public employees' political beliefs or affiliation. They do not protect such employees from discharge for other reasons, e.g. budgetary constraints, the public employer's prior professional or personal relationship with such individuals, the other individuals' prior work experience in the public or private sectors, etc. Accordingly, where a public employee asserts that his termination is a result of a desire on his employer's part to reward some other individual for engaging in activities on behalf of, or for affiliating with, a political party which the terminated public employee has not supported or affiliated

with, the employee must demonstrate that the employer knew of the other individual's affiliations or activities in this regard and intended to reward that individual for such support.

The evidence presented during the trial below made clear that: (1) both plaintiffs and defendants acknowledged that the defendants did not know, and would not have had any basis for knowing, the plaintiffs' political affiliations or support; (2) there was no testimony that those subsequently hired after plaintiffs' termination were hired due to their political affiliations or activities; and (3) plaintiffs failed to call any of the after-hired employees or other personnel who might have been able to establish that the after-hired employees were hired on the basis of their political affiliations or activities. Accordingly, the record below was completely lacking of evidence to prove defendants' knowledge of plaintiffs' political affiliations or lack thereof and also did not contain any evidence that such activities or the lack of such activities played any part whatsoever in their termination or that the after-hired personnel were hired on the basis of their political affiliations.

In denying the defendants' motion for judgment on the basis of qualified immunity, the district court noted that a public employee may not be discharged because of his or her lack of political affiliation or to provide a employment position for a supporter of a political party or candidate. However, the district court also completely disregarded the fact that the record before it failed in any way to demonstrate that the plaintiffs had, in fact, been discharged because of their political affiliations or lack thereof and also the fact that the plaintiffs had made no demonstration that any one who allegedly been hired to replace them was hired on the basis of political support he or she had provided to any political party or candidate.

Apparently, the district court concluded that it was enough for the plaintiffs to show that someone hired at the same time they were discharged had known one of the defendants for a period of time or had been employed in some capacity in a public agency (like the plaintiffs themselves had). As a consequence, under the rulings which are the subject of this petition for certiorari, it is apparently no longer necessary to establish that the termination of a public employee's employment is a result of that employee's political affiliation, the employee's lack of political affiliation or the political activities or affiliations of the individual allegedly hired to replace him. Rather, it is merely necessary to show that the newly hired individual either knew the public employer or had worked in some capacity in a public agency.

Furthermore, in failing to follow the Supreme Court's holdings in Elrod, Branti and Rutan and the Third Circuit's own decision in Laskaris, the courts below also created an as yet unrecognized distinction between the First Amendment rights of a person who chooses to engage in political activity and a person who does not so choose. Under the lower courts' interpretation, a plaintiff who alleges that his choice not to engage in political activity has negatively affected his employment does not have the burden of establishing that defendants knew of that plaintiff's decision not to participate, as required in Elrod and Laskaris, while an individual who has engaged in political activity must meet such a burden.

Moreover, the trial court also lowered the plaintiff's burden of establishing that a plaintiff's decision to participate or not in politics was a substantial or motivating factor in his employer's decision to terminate plaintiffs. In its opinion denying defendants' motion for judgment as a matter of law, the trial court indicated that, in cases involving the decision not to act, direct evidence is rare and such "knowledge must be inferred." In making this

statement, the trial court not only failed to point to one fact from which such inference could be made but also ignored the Third Circuit's decision in Laskaris holding that such knowledge cannot be inferred.

In light of the foregoing, it is clear that the holdings of the Court of Appeals and the district court below reflect a significant extension of established First Amendment jurisprudence. Neither this Court nor any Circuit Court of Appeals have ever premised a First Amendment violation in the absence of proof that a public employee's political affiliations or activties were the cause of his termination.. In fact, the decisions of this Court and other courts make plain that public employers would not considered liable for violating First Amendment rights without such proof. Simply stated, it could not have been clear to the defendants that the termination of plaintiffs' employment would in any way have violated their First Amendment rights.

Accordingly, while the decisions of the Third Circuit Court of Appeals and of the District Court are patently erroneous and should be reversed, they would also, if permitted to stand, constitute a significant extension of the principles previously enunciated by this Court in Elrod, Branti and Rutan and in the decisions of the various Circuit Courts of Appeal noted above. In turn, they would represent a a significant change and extension of the law in this area and one which a reasonable individual could not have anticipated. As a consequence, under the reasonably objective standard, defendants could not have known they were violating plaintiffs' rights and are entitled to qualified immunity under Harlow v. Fitzgerald.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit should be granted.

Respectfully submitted,

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Dated: June 26, 1995

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-5401

JOSEPH CASALE;
WILLIAM EDMUNDS

v.

HAROLD W. GEORGE;
BARRY SKOKOWSKI, SR.,
MELVIN R. PRIMAS, JR.,
JAMES J. FLORIO
individually and in their official capacities.

Harold W. George, Barry Skokowski, Sr.,
and Melvin R. Primas, Jr.,
Appellants

Appeal from the United States District Court
for the District of New Jersey
(D.C. Civ. No. 91-cv-00324)
District Judge: Honorable Harold A. Ackerman

Submitted Under Third Circuit LAR 34.1(a)
March 27, 1995
Before: MANSMANN, COWEN and LEWIS, Circuit Judges.
Filed March 29, 1995

JUDGMENT ORDER

After consideration of all contentions raised by appellants, and for the reasons set forth in the district court opinion dated November 4, 1993, by the Honorable Harold A. Ackerman at Civil Action No. 91-324; it is

ADJUDGED and ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellants.

BY THE COURT,

[Carol Los Mansman]
Circuit Judge

Attest:

[P. Douglas Sisk]
P. Douglas Sisk, Clerk

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

JOSEPH CASALE and WILLIAM EDMUNDS,

Plaintiffs,

v.

HAROLD W. GEORGE, BARRY SKOKOWSKI, SR., and MELVIN R. PRIMAS, JR.,

Defendants.

Civil Action No. 91-324

OPINION & ORDER

ACKERMAN, District Judge:

This matter comes before the court on the motion of the defendants Harold W. George, Barry Skokowski, Sr. and Melvin R. Primas, Jr., for judgment as a matter of law pursuant to Rule 50 of the Federal Rules of Civil Procedure. Defendants made this motion at the close of plaintiffs' case, at which time I reserved a decision. I will now address the motion.

> Rule 50 provides in pertinent part:
> If during a trial by jury a party has been fully heard with respect to an issue and there is no legally

> sufficient evidentiary basis for a reasonable jury to have found for that party with respect to that issue, the court may grant a motion for judgment as a matter of law against that party on any claim ... that cannot under the controlling law be maintained without a favorable finding on that issue.

Fed. R. Civ. P. 50(a).

Judgment as a matter of law is therefore warranted "where there is insufficient evidence from which a jury could reasonably find for the opponent, the court viewing the evidence in the light most favorable to the opponent and giving him the advantage of every fair and reasonable inference." Jones v. Century Oil U.S.A., Inc., 957 F.2d 84, 85 (3d Cir. 1992) (citing Laskaris v. Thornburgh, 733 F.2d 260, 264 (3d Cir.), cert. denied, 469 U.S. 886 (1984)). Keeping this standard in mind, I will now address defendants' motion.

Defendants argue that plaintiffs' claims simply do not implicate the First Amendment. Specifically, they argue that there is no evidence, nor even any allegation, that defendants had knowledge of plaintiffs' political affiliation. Accordingly, they argue that plaintiffs have not made out a sufficient First Amendment claim. I disagree. Plaintiffs are not claiming that they were dismissed because they were of the wrong political affiliation. Indeed, plaintiffs might even concede that the defendants did not know that the plaintiffs wee registered Republicans. In this case, plaintiffs are claiming that they were dismissed because they were not sufficiently involved with political parties or the political process.

This type of claim is clearly encompassed by the First Amendment, as interpreted by the United States Supreme Court in Elrod v. Burns, 427 U.S. 347 (1976), and Branti v. Finkel, 445 U.S. 507 (1980). It is beyond dispute that "[f]reedom of association ... plainly presupposes a freedom not to associate." Roberts v. United States Jaycees, 468 U.S. 609, 623 (1984) (emphasis added); see generally Abood v. Detroit Board of Education, 431 U.S. 209, 235 (1977); Wooley v. Maynard, 430 U.S. 705, 714-15 (1977); West Virginia State Board of Education v. Barnette, 319 U.S. 624, 642 (1943). Accordingly, the First Amendment prohibits the state from compelling a public employee to associate with a political party as a condition of retaining employment. See Elrod, supra; Branti; supra; accord Rutan v. Republican Party of Illinois, 497 U.S. 62, 64 (1990) ("First Amendment forbids government officials to discharge ... public employees solely for not being supporters of the political party in power").

In Elrod, for example, the Supreme Court held that the sheriff could not constitutionally replace certain employees with members of his own party because "the existing employees lack or fail to obtain requisite support from, or fail to affiliate with, that party." Elrod, 427 U.S. at 351, 173.

The Supreme Court reaffirmed these principles more recently in Rutan. In that case, the plaintiffs variously claimed that they had been denied promotions on the ground that they did not work for or did not support the Republican Party, or because they did not have the support of local Republican Party officials, or because they lacked Republican credentials. Under such facts, the Supreme Court affirmed the principle that "conditioning continued public employment on an employee's having obtained support from a particular political party violates the first amendment because of 'the coercion of belief that necessarily flows from the knowledge that one must have a

sponsor in the dominant party in order to retain one's job'." Rutan, 497 U.S. at 71 (quoting Branti, 445 U.S. at 516).

Thus, a public employee cannot be compelled to support or affiliate with a political party or the political process as a condition of his or her employment.

In addition, the Third Circuit has held that it is a violation of the First Amendment to demote an employee simply to make room for politically connected individuals. See Bennis v. Gable, 823 F.2d 723 (3rd Cir. 1987). In Bennis, the plaintiffs argued that they were demoted in retaliation for their support of a particular mayoral candidate. They also argued, in the alternative, that they were demoted in order to make room for the supporters of the opposing mayoral candidate who won the election. The defendants, in turn, argued that "Elrod and Branti should not be extended to cover plaintiffs who were not demoted for political opposition; but rather, were demoted simply to make room for political supporters." Id. at 731. The Third Circuit rejected this argument, explaining

> The problem with this assertion ... is that an alternative view of a demotion to make positions available for political supporters is that the demotion thus reflects a failure to support. A citizen's right not to support a candidate is every bit as protected as his right to support one.

Id. The Third Circuit concluded that "the district court properly charged that the defendants could be found liable if they demoted the plaintiffs to fill positions for [the mayor's] political supporters." Id. at 732. In other words, the Third Circuit found that it would be a violation of plaintiffs' First Amendment rights if the defendants took action against them simply because they did not engage in

politics and were dismissed in order to make room for political supporters.

Applying the principles enunciated in these Supreme Court and Third Circuit cases, I find that plaintiffs' claims in this case, that is, that they were dismissed because they were insufficiently active in politics, and in order to make room for politically-connected individuals, fall within the protection of the First Amendment. Put differently, plaintiffs did not have to allege that they were fired because they were Republicans, or because they belonged to the wrong political party. As such, defendants' knowledge or lack of knowledge of plaintiffs' particular "political affiliation" is not relevant to this case. It is sufficient if they were dismissed because of their lack of political affiliation or involvement in a political party or in order to make room for politically connected individuals. I therefore find that the plaintiffs have alleged a legally cognizable claim under the first Amendment.

Having said this, plaintiffs wee nevertheless required to show that their protected activity was a substantial or motivating factor in the defendants' decision to dismiss them. The Third Circuit has held that implicit in this requirement is that the plaintiffs produce evidence sufficient to show that defendant had knowledge that plaintiffs wee engaged in the protected activity. Laskaris, 733 F.2d at 265; Perez v. Cucci, 723 F. Supp. 209, 239 (D.N.J. 1989). aff'd, 898 F.2d 139 (3d Cir. 1990). In this case, this means that the defendants must have had knowledge either that the plaintiffs exercised their rights not to be involved in the political process or political parties, or that the defendants were being dismissed in order to room for individuals with political connections. In such cases, of course, there will rarely be direct evidence of the requisite knowledge on the part of the defendants. Rather, such knowledge must ordinarily be inferred from all the facts and circumstances. In this case, viewing all the evidence

introduced by both parties in the light most favorable to the plaintiffs and giving plaintiffs the advantage of every fair and reasonable inference, I find that there was sufficient evidence from which a jury could reasonably find for the plaintiffs on their First Amendment claims.

Defendants also argue that if plaintiffs' claim are found to implicate the First Amendment, they are entitled to qualified immunity.

"Government officials are entitled to a qualified immunity from liability for damages if their conduct does not violate clearly established statutory or constitutional rights of which a reasonably person should have known." Bennis, 823 F.2d at 732 (citing Mitchel v. Forsyth, 472 U.S. 511, 517 (1985); Harlow v. Fitzgerald, 457 U.S. 800, 818 (1980)). Defendants apparently argue that the court's holding that plaintiffs' claims implicate the First amendment constitutes an "extension" of Elrod, and Branti and that the law, therefore, was not clearly established at the time of the dismissals.

The Third Circuit has "adopted a broad view of what constitutes an established right of which a reasonable person would have known." Burns v. County of Cambria, 971 F.2d 1015, 1024 (3d Cir. 1992) (citation omitted), cert. denied Roberts v. Mutsko, 113 S.Ct. 1049 (1993). In this regard, the court has held that "there does not have to be a 'precise factual correspondence' between the case at issue and a previous case in order for a right to be clearly established," and that a court "would not be 'faithful to the purpose of immunity by permitting ... officials one liability-free violation of a constitutional or statutory authority.'" Id. (quoting People of Three Mile Island v. Nuclear Regulatory Comm'rs, 747 F.2d 139, 144-45 (3d Cir. 1984)).

Certainly, at the time of the dismissals, the right not to associate was clearly established, se, e.g., Jaycees, 468 U.S. at 623, as was the right not to be discharged from public employment based on lack of political affiliation with a political party. See Elrod, supra; Branti; supra. Moreover, the Third Circuit decided Bennis in 1987. Although Bennis is not factually identical to this case, one of the plaintiff's arguments in that case was that the reason for the dismissal was simply to make room for politically-affiliated persons. I, therefore, find that as of 1987, the law was clearly established that a government official may not dismiss an employee on the ground that the employee lacks political affiliation or in order to make room for politically- connected employees.

For these reasons, I am denying defendants' motion for judgment as a matter of law.[2]

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[2]After the jury in this matter was discharged, the following matter was brought to the court' attention. In addition to awarding compensatory damages to the plaintiffs, the jury awarded nominal damages of $1.00 against each defendant, despite being instructed that it was to consider the issue of nominal damage only in the event it did not award any compensatory damages. This apparent inconsistency is not fatal, however. It is clear from the interrogatories as a whole that the jury found that plaintiffs has sustained actual damages, and that by answering the nominal damages interrogatories, the jury simply thought that it was permissible to award both nominal and compensatory damages. The court will therefore disregard the responses granting each of the plaintiffs nominal damages (Interrogatories Nos. 9 and 19). See McIntosh v. Weinberger, 810 F.2d 1411, 1436 (8th Cir. 1987) (where jury awarded both actual and nominal damages, and it was clear that jury found plaintiffs had suffered actual damages, it would be improper to disturb actual damages portion of award), cert. denied, 487 U.S. 1217 (1988) and cert. granted and judgment vacated on other grounds, 487 U.S. 12112 (1988); see also Floyd v. Laws, 929 F.2d 1390, 1397 (9th Cir. 1991) ("special findings issued in violation of the trial court's express instructions do not constitute legitimate or viable findings of fact. The trial court must therefore dismiss them as surplusage, as a matter of law."); White v. Grinfas, 809 F.2d 1157, 1161 (5th Cir. 1987) (where jury's answer to a question was supposed to terminate further inquiry, trial court may properly disregard "necessarily conflicting answers to any other questions" in violation of court's instructions).

IT IS therefore on this 4th day of November, 1993

ORDERED that defendants's motion for judgment as a matter of law is denied; and it is further

ORDERED that the judgment is this matter will not incorporate the answers to Interrogatories Nos. 9 and 10.

[Harold A. Ackerman]
Harold A. Ackerman, U.S.D.J.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

JOSEPH CASALE and WILLIAM EDMUNDS, Plaintiffs,	)	Civil Action No. 91-324
v.	)	
HAROLD W. GEORGE, BARRY SKOKOWSKI, SR., and MELVIN R. PRIMAS, JR., Defendants.	)	OPINION & ORDER

ACKERMAN, District Judge:

This matter comes before the court on the motion of the defendants Harold W. George, Barry Skokowski, Sr., and Melvin R. Primas, Jr., for judgment as a matter of law pursuant to Fed. R. Civ. P. 50(b), or in the alternative for a new trial pursuant to Fed. R. Civ. P.59.[3]

Judgment as a matter of law is warranted "where there is insufficient evidence from which a jury could reasonably find for the opponent, the court viewing the evidence in the light most favorable to the opponent and

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[3]Defendants initially made a motion for judgment as a matter of law at the close of plaintiffs' case, and again at the conclusion of defendants' case. I reserved decision on the motion both times. On November 4, 1993, I issued an Opinion and Order denying defendants' motion. I incorporate that Opinion and Order in full herein.

giving him the advantage of every fair and reasonable inference." Jones v. Century Oil U.S.A., Inc., 957 F.2d 84, 85 (3d Cir. 1992) (citing Laskaris v. Thornburgh, 733 F.2d 260, 264 (3d Cir.), cert. denied, 469 U.S. 886 (1984)).

A new trial may be granted "when, in the opinion of the trial court, the verdict is contrary to the great weight of the evidence, thus making a new trial necessary to prevent a miscarriage of justice. Roebuck v. Drexel University, 852 F.2d 715, 736 (3d Cir. 1988); Shanno v. MaGee Indus. Enterprises, Inc., 856 F.2d 562, 567 (3d Cir. 1988). In evaluating the evidence, the district court may not substitute its view of the acts and the credibility of the witnesses for that of the jury. Shanno, 856 F.2d at 567. A decision to grant or deny a new trial is within the discretion of the trial court. See id. at 567 (quoting Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. 33, 36 (1980)).

Viewing all the evidence introduced by all parties at trial in the light most favorably to plaintiffs, and giving plaintiffs the advantage of every fair and reasonable inference, I find that there was sufficient evidence from which a jury could reasonably find for the plaintiffs on their claims. In addition, viewing all the evidence introduced by the parties, I find that the verdict is not contrary to the great weight of the evidence.[4]

IT IS therefore on this 6th day of June, 1994

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[4]Defendants also raise two specific objections to the jury charge in this case, both of which are without merit. With respect to the first objection, I find that the requirement of defendants' knowledge was sufficiently covered by may instruction on "substantial or motivating factor." With regard to the second objection, I do not believe my use of the term "political connections" was misleading or confusing when viewed in the context of the entire case and the jury charge as a whole.

ORDERED that defendants' motion for judgment as a matter of law, or in the alternative, for a new trial, is denied.

[Harold A. Ackerman]
Harold A. Ackerman, U.S.D.J.